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IN THE Supreme Court of the United States

October Term, 1970
No. 424

STANLEY ALEXANDER, *et al.*,
Petitioners (Applicants in Intervention),

vs.

PASADENA CITY BOARD OF EDUCATION, UNITED STATES OF AMERICA, NANCY ANNE SPANGLER, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

LEE G. PAUL,
ROBERT G. LANE,
DOUGLAS C. CONROY,
510 South Spring Street,
4th Floor,
Los Angeles, Calif. 90013,
Counsel for Petitioners (Applicants in Intervention).

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

SUBJECT INDEX

	Page
Opinion Below	3
Jurisdiction	3
Questions Presented	3
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	10
1. The Decision Below Conflicts With Those of Other Courts of Appeal as to the Proper Interpretation of Rule 24(a)(2)	10
2. The Decision of the Ninth Circuit Court of Appeals Is in Conflict With the Holding of This Court in Cascade Natural Gas Corp. v. El Paso Natural Gas Corp. and Decisions of Other Federal Courts Interpreting That Decision	15
3. The Decision Below Raises Significant and Recurring Problems With Respect to the Proper Interpretation of Rule 24(a)(2)	16
4. The Court of Appeals Holding With Respect to Permissive Intervention Under Rule 24(a) Is Incorrect	17
Conclusion	18

INDEX TO APPENDICES

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit	1
Order	7
Appendix B. Certificate Certifying the Voter's Signatures	8

TABLE OF AUTHORITIES CITED

Cases	Page
Atkins v. State Board of Education, 418 F. 2d 874 (4th Cir. 1969)	14
Bell v. School City of Gary, Indiana, 324 F. 2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964)	11
Cascade Natural Gas Corp. v. El Paso Natural Gas Corp., 386 U.S. 129 (1967)	9, 15, 16, 17
City of Cleveland v. Cities Service Oil Co., 47 F.R.D. 543 (N.D. Ohio 1969)	16
Deal v. Cincinnati Board of Education, 369 F. 2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967)	11
Deal v. Cincinnati Board of Education, 419 F. 2d 1387 (6th Cir. 1969)	11
Exchange National Bank v. Abramson, 45 F.R.D. 97 (D. Minn. 1968)	16
Lupton Mfg. Co. v. United States, 388 U.S. 457 (1967)	9, 15, 17
Moore v. Tangipahoa Parish School Board, 298 F. Supp. 288 (E.D. La. 1969)	17, 18
Northcross v. Board of Education, 397 U.S. 232 (1970)	12
Nuesse v. Camp, 385 F. 2d 694 (D.C. Cir. 1967)	16
Rolle v. New York City Housing Authority, 294 F. Supp. 574 (S.D.N.Y. 1969)	16
Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969)	7, 8, 9, 10, 12, 13, 14, 15, 16
Spangler v. United States, 415 F. 2d 1242 (9th Cir. 1969)	4

Page

Springfield School Committee v. Barksdale, 348 F. 2d 261 (1st Cir. 1965) 11

State Public Service Corporation v. El Paso Natural Gas Co., 395 U.S. 464 (1969) 15, 16

State of Utah v. American Pipe and Construction Co., 13 Fed. Rules Serv. 2d 24a.22 (C.D. Calif., March 30, 1970) 16

Swann v. Charlotte-Mecklenburg Board of Education, Nos. 14517, 14518 (May 26, 1970) 12

United States v. Blue Chip Stamp Company, 272 F. Supp. 432 (C.D. Calif. 1967) 17

United States v. First National Bank & Trust Co., 280 F. Supp. 260 (E.D. Ky. 1967) 16

Zuber v. Allen, 387 F. 2d 862 (D.C. Cir. 1967) 16

Rules

Federal Rules of Civil Procedure, Rule 24 2

Federal Rules of Civil Procedure, Rule 24(a)(2) 2, 6, 7, 12, 16, 17, 18

Federal Rules of Civil Procedure, Rule 24(b) 2, 17, 18

Federal Rules of Civil Procedure, Rule 24(b)(2) .. 18

Statutes

Civil Rights Act of 1964, Sec. 902 4

United States Code, Title 28, Sec. 1254(1) 3

United States Code, Title 42, Sec. 2000h-2 4

United States Constitution, Fourteenth Amendment 5

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PASADENA CITY BOARD OF EDUCATION, UNITED STATES OF AMERICA, NANCY ANNE SPANGLER, *et al.*,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Stanley Alexander, Nancy Alexander, Wesley E. Anderson, Robert Bellue, Frank M. Bianco, A. A. Binney, Jr., Bailey B. Bishop, John G. Booker, Maxwell A. Booth, John H. Born, Victor M. Bostwick, John W. Bowling, Ralph R. Bush, Carol Cherry, Robert F. Cherry, Robert V. Clearwater, Mrs. Richard Cleveland, George F. Cole, Thomas S. Cooke, S. T. Crosby, Jr., Juard Crowley, Henry H. Danowsky, Maxine Danowsky, Robert G. Davis, Jean S. Davis, Bernard Davis, Harry L. Dietrich, Virginia Dietrich, A. Crosby Doe, Mary Helen Doe, Danny K. Dunbar, Will C. Duncan, David Dunham, Milton R. Emer-

son, Georgia Emerson, Robert Hobbs, Carol Hobbs, Janice K. Hodgdon, Anne Johansen, Dr. Norman Johnson, William Richard Jones, Michael Jane Kaufman, Nadine M. Keller, Arthur N. Knapp, Bruce R. Lamb, J. M. Maylor, Richard W. Millar, Jr., Donald Minovitz, Barbara J. Morales, Mr. and Mrs. John W. Palmer, Jack Park, Martha Park, George Pastre, Jr., Rachel Pastre, Orlan E. Paulson, Erik Pedersen, Jean Pedersen, Frances Pedley, Theodore Pella, Christel Pella, Donald P. Pendleton, Nita Lu Pendleton, Sheldon Pessin, Joe Petrotta, Rosemary Petrotta, William A. Pettit, Jr., Barbra Pettit, Lucile C. Pickett, Paul R. Pinsak, Colleen Pinsak, Regina Pomerantz, Pauline Potter, Joan W. Pringle, Shirley Probert, Mary Lou Reed, Ralph R. Rule, Kathryn Rule, Carolyn L. Saniforth, Arthur Schopeck, Roslyn Schopeck, Milan D. Smith, Jr., Mr. and Mrs. Richard Spanjian, Mr. & Mrs. Gary Walker, Stanley M. Walters, Adela Ward, Stuart Warren, Patsy D. Weaver, Mr. and Mrs. Paul Weeks, Mr. & Mrs. Sam Weiss, Elizabeth Welch, L. B. Welch, Mr. & Mrs. Kellogg P. Wells, William P. Welsh, Dale White, William Lewis White, Arla Gene Wiberg, Robert E. Willard, Mr. R. E. Williams, Mr. T. A. Williams, Mr. W. W. Williamson, Mr. William A. Wils, Mrs. Anna Wilson, Mr. Ralph W. Wilson, Mr. Jerold W. Wilwerding, Mr. L. M. Witter, Mrs. Alice Wittig, Mr. Chet Woodman, Henry Yost, Frederick Zens and Janis Zens respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 15, 1970.

Opinion Below.

The Opinion of the Court of Appeals, not yet reported, together with the Order Correcting Opinion, appears in Appendix "A" hereto. No written opinion was rendered by the United States District Court for the Central District of California.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 15, 1970 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1)

Questions Presented.

1. Whether petitioners, as parents of children attending schools within a school district which has had a United States District Court integration order entered imposing constraints upon the School Board's discretion, have a right to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure to prosecute a timely appeal from the District Court's order when a majority of the governing board of that school district has refused to do so.

2. Whether permissive intervention under Rule 24 (b) of the Federal Rules of Civil Procedure is precluded in the absence of a finding of a right to intervene under Rule 24(a)(2).

Statutory Provisions Involved.

United States Code, Title 28: Rule 24.

"(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action:

. . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Statement of the Case.

This case was originally a class action filed in the United States District Court for the Central District of California on August 28, 1968, against the Pasadena City Board of Education and three named members of the Board, by Pasadena parents seeking desegregation of three public high schools in the Pasadena Unified School District.

Prior to the filing of an answer by the Board of Education, the United States sought to intervene under Section 902 of the Civil Rights Act of 1964, 42 U.S.C. §2000h-2. Its complaint in intervention brought into the case the entire Pasadena school system and prayed for an injunction enjoining the Board of Education and its members from discrimination on the basis of race and from failing to adopt and implement a plan for the elimination of discriminatory practices. The Government's right to so broaden the scope of the case was upheld in an interim appeal. See *Spangler v. United States,* 415 F. 2d 1242 (9th Cir. 1969).

Following a trial on the merits and on January 22, 1970, the District Court entered its findings of fact and conclusions of law in which it found that there was a racial imbalance or segregation in both student bodies and faculties of the Pasadena Unified School District on all levels. The Court also expressed concern over the District's "interclass grouping policies and procedures," although not deeming it appropriate "at this time" to enter an Order in this regard [Clk. Tr. p. 55].

The District Court, in Finding No. 5, also found specifically that the Board of Education had used a neighborhood school policy and a policy against forced cross-town bussing to justify its failure to carry out policies to integrate students, teachers, and staff members [Clk. Tr. p. 55]. The District Court further stated that the observance of a neighborhood school policy resulted in racial imbalance and increasing racial imbalance and that the same was true of the Board of Education's policy against cross-town bussing [Clk. Tr. p. 55]. The District Court, in Conclusion of Law No. 2, also held that the use of a strict neighborhood school policy and a policy against cross-town bussing took on constitutional significance as a violation of the Fourteenth Amendment to the Constitution of the United States [Clk. Tr. p. 56].

On January 23, 1970, the judgment of the District Court was entered in accordance with the findings of fact and conclusions of law. Said judgment enjoined the Pasadena City Board of Education from discriminating on the basis of race in the operation of the Pasadena Unified School District [Clk. Tr. p. 59]. The Court further ordered that the Board of Education adopt a plan to correct racial imbalance on

all levels of the Pasadena Unified School District [Clk. Tr. p. 60]. To implement said order, defendants were required to submit a plan to the Court by February 16, 1970 [Clk. Tr. p. 60]. The plan was to include and provide for student assignments in such a manner that, on or before the beginning of the school year that commences in September of 1970, there should be no school in the District with a majority of any minority students [Clk. Tr. p. 60].

On January 27, 1970, at a special meeting of the Pasadena City Board of Education, the Board by a 3-2 vote defeated a motion to appeal the judgment of the District Court [Clk. Tr. pp. 78-79].

On March 2, 1970, a motion and notice of motion for leave to intervene in the action was filed by a number of parents of children attending schools within the Pasadena Unified School District. The parents who have formally appeared and participated in these proceedings now number *116*. [Clk. Tr. pp. 221-23]. These parents, petitioners herein, contended that they were entitled to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure on the ground that their interests in the education of their children were no longer adequately represented in light of the Pasadena City Board of Education's decision not to appeal the judgment of the United States District Court [Clk. Tr. p. 182].

An order shortening time was granted by the District Court so as to advance the date of the hearing on the motion to intervene to March 4, 1970, the date on which the Court had previously agreed to consider the School Board's plan for integration submitted pursuant to the District Court's judgment. On March 4,

1970, counsel for applicants for intervention orally argued to the District Court that the interests of their clients in the education of their children were not adequately protected by the Pasadena City Board of Education in light of the Board's 3-2 decision not to appeal the decision of the District Court [Clk. Tr. pp. 78-79]. In addition, the argument was made to the District Court that, in light of the importance of the Court's decision concerning bussing of students in order to achieve a racial balance in each of the schools of the District, so that no school at any level would have a majority of any minority by September 1970, the Court should permit intervention by these parents so that a thoughtful review could be had on appeal of this important facet of the decision of the District Court [Rep. Par. Tr. pp. 19-20].

The Government of the United States indicated its agreement with counsel for Petitioners that certain questions presented by the judgment had not been settled by the appellate courts and conceded that the Government had no objection either to intervention or appeal [Rep. Par. Tr. pp. 20, 25-27, 41]. Counsel for plaintiffs, however, argued against intervention as did counsel for defendant Pasadena City Board of Education [Rep. Par. Tr. pp. 31-37, 41-44].

In support of petitioners' position, counsel for petitioners in addition to other authorities, cited and quoted at length from the *en banc* decision of the District of Columbia Court of Appeals in *Smuck v. Hobson,* 408 F. 2d 175 (D.C. Cir. 1969), where the identical question involving the right of parents to intervene under Rule 24(a)(2) was presented and decided. The District Court, however, declined to give any weight to the de-

cision in *Smuck,* designating Judge Bazelon's decision simply as a minority opinion of that Court. [Rep. Par. Tr. pp. 7-8]. Even the Government attorneys did not accept this appraisal of Smuck by the District Court and, in open court, admitted an inability to find any contrary authority. The District Court also held that the application for intervention after judgment was untimely, although only slightly over five weeks had transpired since the Court's decision and the Board of Education's election not to appeal. Further the record showed that this time was required by the applicants to raise sufficient funds to employ counsel for the purpose of seeking to intervene [Rep. Par. Tr. p. 23]. The Court concluded that applicants lacked sufficient interest to intervene as a matter of right and that the Court would not permit intervention in the exercise of its discretion [Rep. Par. Tr. pp. 23-24].

Immediately thereafter, and also on March 4, 1970 the District Court approved a plan of implementation of the Court's Order submitted by a majority of the Board of Education which contemplated abolition of the neighborhood school system and mandatory bussing at a cost preliminarily estimated to exceed $1,000,000 per year [Clk. Tr. p. 127].

Thereafter, and on March 6, 1970, these petitioners petitioned the Court of Appeals for the Ninth Circuit for a Writ of Mandamus, which petition was denied on March 17, 1970, on the ground that the Order denying intervention was an appealable order. At the same time, however, the Court authorized petitioners to file an expedited appeal covering the denial of intervention and also provided for the filing of a Protective Notice of Appeal from the District Court's Order of

January 22, 1970. All proceedings on the latter appeal were ordered held in abeyance pending disposition of the expedited appeal from the order denying intervention.

The record was agreed upon, the matter was extensively briefed by all parties, including *amicus curiae* opposing intervention, and oral argument was heard by the Ninth Circuit Court of Appeals on May 12, 1970. On June 15, 1970, the opinion of the Court of Appeals was filed affirming the judgment below.

While the decision of the Court of Appeals affirmed the District Court, the grounds for so doing were not those relied upon by the District Court. In particular, the Ninth Circuit Court of Appeals in its opinion sought to distinguish the obligations imposed on the Pasadena City Board of Education from those imposed on the Board of Education for the District of Columbia in *Smuck v. Hobson,* 408 F. 2d 175 (D.C. Cir. 1969). Our Appellate Court also sought to justify its refusal to apply the reasoning in the *Smuck* decision to our case on the ground that the governing body of the District of Columbia School System which had made the decision not to appeal was appointive and was soon to be replaced by an elected body. Finally, the Ninth Circuit Court of Appeals declined to give effect to this Court's holding in *Cascade Natural Gas Corp. v. El Paso Natural Gas Corp.,* 386 U.S. 129 (1967), because of this Court's subsequent *per curiam* decision in *Lupton Mfg. Co. v. United States,* 388 U.S. 457 (1967).

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With Those of Other Courts of Appeals as to the Proper Interpretation of Rule 24(a)(2).

Although the Ninth Circuit Court of Appeals asserted that its decision here followed the rationale of the District of Columbia Court of Appeals in *Smuck v. Hobson,* 408 F. 2d 175, our appeals court avoided reaching the same result on two grounds:

First, the Court characterized the restraints imposed on the school system in *Smuck* as "far more oppressive than those in the decree before us." Second, the Court felt that *Smuck* was distinguishable in that the restraints in that case had been imposed on a lame-duck appointive school board which had subsequently been replaced by an elected board not opposing intervention.

We contend that the distinguishing features found by the Court of Appeals in our case are either non-existent or, in the alternative, do not provide a rational basis for distinguishing the result reached in *Smuck* on the right to intervene, thus giving rise to a direct conflict between the instant decision and that in *Smuck.*

One of the most disturbing features of the Ninth Circuit's decision is the effort to distinguish *Smuck* because the burden imposed on the Pasadena Unified School District was supposedly less onerous, thus implicitly assuming that the District Court's underlying judgment could not be questioned even if appellants were permitted to intervene.

We submit this assumption is improper, if petitioners are allowed to intervene, both the underlying judgment

and the remedy required by the District Court will be questioned. In particular, petitioners will challenge the judgment on the ground that such racial imbalance as may exist in the Pasadena Unified School District has been caused by residential patterns and neighborhood schools. That this is indeed the case is reflected in the findings of the District Court that the School District's policy of neighborhood schools and its failure to undertake forced cross-town bussing have taken on constitutional significance. There is no authority on this point in the Ninth Circuit, but recent Court of Appeals decisions indicate that such *de facto* segregation is not illegal. See *Deal v. Cincinnati Board of Education,* 419 F. 2d 1387 (6th Cir. 1969); *Deal v. Cincinnati Board of Education,* 369 F. 2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967); *Springfield School Committee v. Barksdale,* 348 F. 2d 261 (1st Cir. 1965); *Bell v. School City of Gary, Indiana,* 324 F. 2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964).

Furthermore, the plan fashioned to comply with the District Court's judgment in this case requires the bussing of 13,500 out of a total school population of 30,500 in a geographically scattered and diverse school district at an annual cost of almost $1,000,000, as well as extensive faculty movement. Thus a much heavier financial burden and more extensive bussing is imposed on the Pasadena School District than in *Smuck* where the Court's decree required only that "volunteering" children be bussed. In the instant case, forced bussing will be imposed upon 40% of the student body.

Moreover, in light of the recent decision of the Court of Appeals for the Fourth Circuit, in *Swann v. Charlotte-Mecklenburg Board of Education,* Nos. 14517, 14518 (May 26, 1970), scheduled for review by this Court during the October, 1970 Term, the Ninth Circuit's characterization of the burden imposed by compliance with the District Court's decree is clearly untenable.

The decision in *Swann* was drawn to the Ninth Circuit's attention by way of a Motion for Injunction one week before the decision in this case issued. In that Motion, we pointed out that the Court of Appeals in *Swann* had questioned the reasonableness of a plan requiring bussing of 13,000 pupils in a school district of 84,500 pupils and that the plan in our case required bussing of 13,500 out of a school enrollment of only 30,500. See also *Northcross v. Board of Education,* 397 U.S. 232, 236 (1970) (Burger, *C.J.*, concurring).

The second basis for the Ninth Circuit's decision in our case appears to rest on the fact that a majority of the Pasadena School Board as the elected representatives of these appellant parents voted not to appeal the District Court's order. In other words, the Board's decision not to appeal was determinative of the rights of the appellants under Rule 24(a)(2). Such a holding is directly contrary to the decision in *Smuck* where the court, in passing upon the adequacy of the representation of parents' interests where the School Board declined to appeal, stated:

> "In this case, the interests of the parents who wish to intervene in order to appeal do not coincide with those of the Board of Education. The school board represents all parents within the District.

> The intervening appellants may have more parochial interests centering upon the education of their own children. While they cannot of course ask the Board to favor their children unconstitutionally at the expense of others, they like other parents can seek the adoption of policies beneficial to thir own children. Moreover, considerations of publicity, cost, and delay may not have the same weight for the parents as for the school board in the context of a decision to appeal. And the Board of Education, buffeted as it like other school boards is by conflicting public demands, may possibly have less interest in preserving its own untrammeled discretion than do the parents. It is not necessary to accuse the board of bad faith in deciding not to appeal or of a lack of vigor in defending the suit below in order to recognize that a restrictive court order may be a not wholly unwelcome haven."
>
> *Smuck v. Hobson,* 408 F. 2d 175, 181.

Although we do not believe the presence or absence of a franchise to vote for members of a school board is a rational or proper basis for allowing or denying intervention, we feel constrained to point out that there is a recall election now pending in Pasadena against the three members of the Pasadena City Board of Education who voted against appeal of the District Court's decision. A copy of the certificate certifying the voters' signatures necessary for this recall is attached as Appendix "B". Approximately 19,000 qualified Pasadena voters have thus indicated their disagreement with the School Board's decision not to appeal and, in the event

the recall is successful on October 13, 1970, the lame duck situation relied upon by the Ninth Circuit to distinguish the instant case from *Smuck* is eliminated and cases are in fact on "all fours."

It should also be pointed out that there is no support in the record for the Ninth Circuit's statement that the 3-2 decision of the Pasadena City Board of Education not to appeal "was made following public hearings at which appellants had full opportunity to influence the board's decision." Indeed, the record indicates just the opposite, showing a special session being held on the question of appeal [Clk. Tr. pp. 78-79], with a General Session being held shortly thereafter on the same date in the same premises. The press of people *at this latter session* forced the moving of the meeting and its reconvening at a different location [Clk. Tr. pp. 80-83].

In summary, there is clearly a conflict between the decision in this case denying intervention and that of the District of Columbia Court of Appeals in *Smuck v. Hobson,* 408 F. 2d 175 (D.C. Cir. 1969), and the subsequent decision of the Fourth Circuit Court of Appeals in *Atkins v. State Board of Education,* 418 F. 2d 874, 876 (4th Cir. 1969), which in allowing intervention to parents of school children, recognized "the intense interest of parents in the education of their children" and the fact that "[i] intervention in suits concerning public schools has been freely allowed."

2. The Decision of the Ninth Circuit Court of Appeals Is in Conflict With the Holding of This Court in Cascade Natural Gas Corp. v. El Paso Natural Gas Corp. and Decisions of Other Federal Courts Interpreting That Decision.

In footnote 3 to its opinion, the Ninth Circuit went to considerable length to distinguish this Court's decision on intervention in *Cascade Natural Gas Corp. v. El Paso Natural Gas Corp.*, 386 U.S. 129 (1967), on the ground that the Court there dealt with an aberrant factual situation. In a round-about way, the Ninth Circuit has held that the *Cascade Natural Gas* decision should not be read to say what it expressly does say about the right to intervene.

In seeking to avoid this Court's decision in *Cascade Natural Gas,* the Ninth Circuit relied on the subsequent *per curiam* decision in *Lupton Mfg. Co. v. United States,* 388 U.S. 457 (1967), to bolster its contention that the earlier decision on intervention was used as a vehicle to reach the question of whether the Court's mandate had been carried out. This interpretation had been suggested by several 1967 law review commentaries which had mentioned this Court's decision in *Lupton.* The Court of Appeals, in *Smuck,* while taking cognizance of these same secondary authorities gave considerably greater credence to this Court's decision in *Cascade Natural Gas.* 408 F. 2d at 179 n. 16.

Moreover the Ninth Circuit's reading of *Lupton,* is unwarranted in light of this Court's subsequent decision in *State Public Service Corporation v. El Paso*

Natural Gas Co., 395 U.S. 464 (1969) in which this Court indicated both a willingness and ability to remedy violations of its mandate without any need to rely upon intervening parties as a vehicle.

Furthermore, the decision of our Court of Appeals ignores the plethora of authority in other federal courts which have followed the liberal interpretation of Rule 24(a)(2) set forth in the *Cascade Natural Gas* decision. See *Smuck v. Hobson*, 408 F. 2d 175, 179 (D.C. Cir., 1969); *Zuber v. Allen*, 387 F. 2d 862 (D.C. Cir. 1967); *Nuesse v. Camp*, 385 F. 2d 694 (D.C. Cir. 1967); *State of Utah v. American Pipe and Construction Co.*, 13 Fed. Rules Serv. 2d 24a.22 (C.D. Calif., March 30, 1970); *Rolle v. New York City Housing Authority*, 294 F. Supp. 574, 577 (S.D.N.Y. 1969); *City of Cleveland v. Cities Service Oil Co.*, 47 F.R.D. 543, 546 (N.D. Ohio 1969); *Exchange National Bank v. Abramson*, 45 F.R.D. 97, 102-03 (D. Minn. 1968); *United States v. First National Bank & Trust Co.*, 280 F. Supp. 260, 263 (E.D. Ky. 1967).

3. The Decision Below Raises Significant and Recurring Problems With Respect to the Proper Interpretation of Rule 24(a)(2).

As has been heretofore noted, the decision of the Court of Appeals in refusing to give effect to the holding of this Court in the *Cascade Natural Gas* case, has the effect of limiting the holding of this Court to the factual situation there presented.

In the three years since that decision, there has been a pronounced, although not widespread, minority inclination in the lower federal courts to disregard the decision in *Cascade Natural Gas* because of this Court's

later *per curiam* decision in ***Lupton Mfg. Co. v. United States,*** 388 U.S. 457 (1967). In addition to the instant decision, the decisions in *United States v. Blue Chip Stamp Company,* 272 F. Supp. 432, 438 (C.D. Calif. 1967) and *Moore v. Tangipahoa Parish School Board,* 298 F. Supp. 288, 291 (E.D. La. 1969) have used similar arguments to deny intervention under Rule 24(a)(2).

With these minority line decisions now given new life by this decision of the Ninth Circuit, it would also appear appropriate for this Court to grant the instant petition so that the proper construction of Rule 24(a)(2) as laid down by *Cascade Natural Gas* may be further elucidated.

4. The Court of Appeals Holding With Respect to Permissive Intervention Under Rule 24(a) Is Incorrect.

Petitioners did not, in the District Court, seek intervention under Rule 24(b). However, the District Court at the time of considering the Motion to Intervene under Rule 24(a)(2) on its own motion also treated it as a Motion under Rule 24(b) and denied intervention under that Rule.

On appeal, petitioners argued that that denial was an abuse of discretion, given the important questions raised concerning the illegality of *de facto* segregation. The Court of Appeals dismissed this portion of the appeal in one sentence, stating:

> "It is clear that in absence of a *right* to intervene under Rule 24(b), the refusal of the District Court to permit intervention under Rule 24(b) was not an abuse of discretion."

The Court cited no authority for this statement, which denies any effect to Rule 24(b). Moreover, this holding while doing violence to the clear language of Rule 24(b) also ignores at least one recent decision to the contrary in which, although intervention was denied under Rule 24(a)(2), it was granted under Rule 24(b). See *Moore v. Tangipahoa Parish School Board,* 298 F. Supp. 288 (E.D. La. 1969).

Conclusion.

Petitioners, as parents of children in the Pasadena Unified School District, have an important and continuing interest in the education of their children, an interest radically effected by implementation of the District Court's decision. This interest is clearly being impaired by the refusal of the Pasadena School Board to secure a review of the District Court's order. The Petition for Writ of Certiorari herein should be granted, therefore, not only to resolve a conflict in the circuits on the proper interpretation of Rules 24(a)(2) and (b)(2), but also in the interest of justice so that these parents may have review of the decision of the District Court on the constitutionality of the neighborhood school concept. Pasadena Unified School District will be treated no differently than the schools in other school districts in the United States with respect to mandatory bussing involving neighborhood schools.

Respectfully submitted,

LEE G. PAUL,
ROBERT G. LANE,
DOUGLAS C. CONROY,
Counsel for Petitioners (Applicants in Intervention).

July 22, 1970.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Nancy Anne Spangler, et al., *Appellees-Plaintiffs,* and United States of America, *Appellee-Plaintiff in Intervention,* vs. Pasadena City Board of Education, et al., *Appellees-Defendants,* Stanley Alexander, et al., *Appellants-Applicants in Intervention.* No. 25,611.

[June 15, 1970]

On Appeal from the United States District Court for the Central District of California.

Before: HAMLEY, MERRILL and WRIGHT, Circuit Judges.

MERRILL, Circuit Judge:

This appeal is taken by appellants Alexander, et al., from an order of the District Court denying them leave to intervene in a suit brought by Spangler, et al., against the Pasadena Board of Education. The plaintiffs below are Negro school children. Their suit is a class action brought to compel integration of the Pasadena schools, in which the United States has intervened on their behalf. (*See Spangler v. United States,* 415 F.2d 1242 (9th Cir. 1969).)

In the court below the suit was defended by the Board of Education and a full trial on the merits resulted. Judgment was for the plaintiff children. The court found the existence of discriminatory practices and ordered that they cease. The board was directed to submit a plan to correct the effects of past discrim-

ination.[1] The board, following hearings, voted to comply with the decree and not to appeal and has since submitted a plan for the 1970-71 school year.

The appellants, parents of other Pasadena school children, are dissatisfied with the court decree and the decision of the board. They seek to intervene so that they may press appeal from the District Court order.

Rule 24 Fed.R.Civ.P. provides for intervention.[2] It is clear that in absence of a *right* to intervene under Rule 24(a) the refusal of the District Court to permit intervention under Rule 24(b) was not an abuse of discretion. Thus the question here presented is whether, under 24(a)(2) appellants had a right to intervene which the District Court, under the rule, was required to respect.

The same question (under distinguishing circumstances to be later discussed) arose in *Smuck v. Hob-*

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[1]The plan was to include, inter alia, procedures for the assignment, hiring and promotion of teachers and staff members and for location and construction of new school facilities such as to correct the racial imbalance in the Pasadena school systems. It was to provide for pupil assignment in such a way as to assure by September, 1970, that "there shall be no school in the District, elementary or junior high or senior high school, with a majority of any minority students."

[2]"*Rule 24. Intervention*

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

son, 408 F.2d 175 (D.C. Cir. 1969). The District Court there had held that the method of operating schools used by the Board of Education in the District of Columbia unconstitutionally deprived Negro and poor children of their right to equal educational opportunities. A decree was entered which quite specifically spelled out the required remedy. *Hobson v. Hansen,* 269 F.Supp. 401 (D.D.C. 1967). The board decided not to appeal and parents of school children, disagreeing with the court's holding and decree, sought intervention in order to press an appeal. The District Court held that the intervenors failed to satisfy the requirements of Rule 24(a) but granted the motions so that the Court of Appeals would have the opportunity to rule on the issues involved. *Hobson v. Hansen,* 44 F.R.D. 18, 33 (D.D.C. 1968).

The Court of Appeals, sitting in banc, carefully considered the three requirements for intervention of right under Rule 24(a)(2). A majority concluded that parents of school children did have a sufficient interest in certain aspects of the action to meet the requirements of the rule; that they were so situated that disposition of the action might, as a practical matter, impair or impede their ability to protect that interest; and that their interest, under the circumstances, was not adequately represented by the Board of Education. Intervention was allowed.

The protectable interest of the parents was, however, recognized to be a narrow one. It was not their interest in opposing a plan of integration as such. Rather their interest was in freeing the board from judicial restraint so that the board could exercise its dis-

cretion to the fullest degree constitutionally permissible in deciding educational policies.

> "[T]heir interest extends only to those parts of the order which can fairly be said to impose restraint upon the Board of Education." 408 F.2d at page 182.

Such is the limited interest of appellants in the case before us. Our case, however, differs greatly from *Smuck* in the extent of the protectable interest of appellants and the circumstances bearing upon the adequacy of the manner in which the Board of Education has represented appellants in the protection of that interest. Consequently, while following the general rationale of *Smuck* we reach a different result.

In *Smuck* the Board of Education was a "lame duck" appointed board, soon to be superseded by an elected board. Such restraints as were imposed by court decree would be felt not by the litigant board but by its successor Restraints imposed were far more oppressive than those in the decree before us. The lack of adequate representation of appellants' interest by the board was in "the decision not to appeal," (408 F.2d at page 182), made by this appointed board—a decision that would be felt by the elected representatives of the residents of the school district constituting the new board. Significantly, the new board did not oppose the intervention.

In the case before us the decision not to appeal was in effect a decision tc acquiesce in the court decree—a decision made by the very board affected by the decree. The decision was made by a board of elected representatives of the residents of the school district,

including these appellants. It was made following public hearings at which appellants had full opportunity to influence the board's decision. That decision was within the competence of the board in balancing many competing factors against the relatively modest degree of restraint imposed by the decree.

Pursuant to court decree the board has now adopted a plan for integration of the schools which has been submitted to the court and received court approval. Before us the board opposes appellants in their effort to intervene. It wishes to be free forthwith to put its plan into operation and argues persuasively that intervention and a prolongation of this suit will cause confusion and turmoil within the school district and be disruptive of their plan.

It is clear that the protectable interest of appellants in the freedom of their school board from excessive judicial interference is substantially less apparent here than it was in *Smuck*. Such restraints as were imposed have in substance been found acceptable by the board and thus create no present prejudice.

Changed circumstances, future developments in the law or experience indicating unworkability will permit this or future boards to seek relief from some specific restraint or aspect of the plan approved for 1970-71. *Dombrowski v. Pfister,* 380 U.S. 479 (1965); *System Federation v. Wright,* 364 U.S. 642 (1961); *Lapin v. Schultz,* 333 F.2d 169 (9th Cir.), *cert. denied,* 379 U.S. 904 (1964). Such action may well lead to review and modification of the order under the continuing jurisdiction of the District Court.

Smuck v. Hobson, supra, is not, of course, the only recent case construing Rule 24(a)(2). We have con-

cluded, however, that none of the others control in the peculiar factual and legal context presented here.[3] We hold that under these circumstances the Pasadena School Board, in making its decision not to appeal, was adequately acting in protection of the limited interest of these appellants. The District Court correctly interpreted Rule 24(a)(2); its ruling will not be disturbed.

The order denying appellants' intervention is affirmed.

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[3]In the most important of these, *Cascade Nat. Gas Corp. v. El Paso Natl. Gas. Co.*, 386 U.S. 129 (1967), the Supreme Court permitted a group of potential customers to intervent in protracted antitrust litigation involving the United State: (as appellee) as well as several utilities. Divestiture had earlier been ordered, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964), but the Attorney General settled instead. It was clear from the Court's consideration of the case on the merits that it felt the Attorney General had attempted to circumscribe the execution of the Court's mandate. *Id.* at 136.

Arguably, a strict application of this liberal reading of Rule 24(a)(2) would support appellants' motion for intervention. But, in *Lupton Mfg. Co. v. United States*, 388 U.S. 457 (1967), decided a few months after *Cascade*, the Supreme Court indicated that *Cascade* was not to be read so broadly. In *Lupton* the Court dismissed per curiam an appeal from a denial of intervention in a case involving an antitrust consent decree. Other courts have refused to treat *Cascade* as "carte blanche" for intervention, *Hobson v. Hansen*, 44 F.R.D. 18, 25 (D.D.C. 1968), or accept it as applying except to an extraordinary fact situation, *Smuck v. Hobson*, 408 F.2d 175, 179 n. 16 (D.C.Cir. 1968). Many commentators agree; *e.g.*, Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv.L.Rev. 356, 406 (1967); Note, 81 Harv.L.Rev. 221 (1967). Consequently, we feel that *Cascade* is not to be read as permitting intervention of right to *any* person conceivably affected adversely by pending litigation, and do not view it as controlling here.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

Nancy Anne Spangler, et al., Appellees-Plaintiffs, and United States of America, Appellee-Plaintiff in Intervention, vs. Pasadena City Board of Education, et al., Appellees-Defendants, Stanley Alexander, et al., Appellants-Applicants in Intervention. No. 25,611.

Before: HAMLEY and MERRILL, Circuit Judges.

The opinion in this matter is ordered corrected by striking the word "Negro" in line 4 of the first paragraph, page 1 of the slip opinion.

.....

.....

Circuit Judges

APPENDIX B.

Certificate of the Registrar-Recorder County of Los Angeles.

I, RAY E. LEE, Registrar-Recorder of the County of Los Angeles, State of California, hereby certifiy that on the 15th day of June, 1970, there was left for examination in the office of the Registrar-Recorder of said county an original petition for the Recall of Albert C. Lowe, Jr. from the office of Governing Board Member of the Pasadena Unified School District, and the total number of registered voters in said District as of that date was 88,334, 20% being 17,667 and was signed by 14,982 Registered Voters of said District.

I further certify that thereafter on the 6th day of July, 1970, there was left for examination in the office of the Registrar-Recorder a supplemental petition identical with said original petition as to subject matter, and the total number of registered voters in the Pasadena Unified School District as of July 6, 1970, was 88,334, 20% being 17,667.

I further certify that I have checked the signatures on said supplemental recall petition, and find that same was signed by 3,347 registered voters of said District.

The combined total of the number of qualified registered voters signing the original and supplemental recall petition was 18,329.

I further certify that the petition is sufficient.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal this 16th day of July, 1970.

RAY E. LEE, Registrar-Recorder, County of Los Angeles, By Margarite Brown, Elections Deputy.

[Seal]

This is a true certified copy of the record if it bears the seal of the Registrar-Recorder imprinted in purple ink.

With Fee July 17, 1970. Ray E. Lee, Registrar-Recorder, Los Angeles County, California, July 16, 1970.

Certificate of the Registrar-Recorder
County of Los Angeles.

I, RAY E. LEE, Registrar-Recorder of the County of Los Angeles, State of California, hereby certifiy that on the 15th day of June, 1970, there was left for examination in the office of the Registrar-Recorder of said county an original petition for the Recall of Lu-Verne La Motte from the office of Governing Board Member of the Pasadena Unified School District, and the total number of registered voters in said District as of that date was 88,334, 20% being 17,667 and was signed by 15,250 Registered Voters of said District.

I further certify that thereafter on the 6th day of July, 1970, there was left for examination in the office of the Registrar-Recorder a supplemental petition identical with said original petition as to subject matter, and the total number of registered voters in the Pasadena Unified School District as of July 6, 1970, was 88,334, 20% being 17,667.

I further certify that I have checked the signatures on said supplemental recall petition, and find that same was signed by 3,372 registered voters of said District.

The combined total of the number of qualified registered voters signing the original and supplemental recall petition was 18,622.

I further certify that the petition is sufficient.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal this 16th day of July, 1970.

RAY E. LEE, Registrar-Recorder, County of Los Angeles, By Margarite Brown, Elections Deputy.

[Seal]

This is a true certified copy of the record if it bears the seal of the Registrar-Recorder imprinted in purple ink.

With Fee July 17, 1970. Ray E. Lee, Registrar-Recorder, Los Angeles County, California, July 16, 1970.

Certificate of the Registrar-Recorder
County of Los Angeles.

I, RAY E. LEE, Registrar-Recorder of the County of Los Angeles, State of California, hereby certifiy that on the 15th day of June, 1970, there was left for examination in the office of the Registrar-Recorder of said county an original petition for the Recall of Joseph J. Engholm from the office of Governing Board Member of the Pasadena Unified School District, and the total number of registered voters in said District as of that date was 88,334, 20% being 17,667 and was signed by 15,245 Registered Voters of said District.

I further certify that thereafter on the 6th day of July, 1970, there was left for examination in the office of the Registrar-Recorder a supplemental petition iden-

tical with said original petition as to subject matter, and the total number of registered voters in the Pasadena Unified School District as of July 6, 1970, was 88,334, 20% being 17,667.

I further certify that I have checked the signatures on said supplemental recall petition, and find that same was signed by 3,312 registered voters of said District.

The combined total of the number of qualified registered voters signing the original and supplemental recall petition was 18,557.

I further certify that the petition is sufficient.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal this 16th day of July, 1970.

RAY E. LEE, Registrar-Recorder, County of Los Angeles, By Margarite Brown, Elections Deputy.
[Seal]

This is a true certified copy of the record if it bears the seal of the Registrar-Recorder imprinted in purple ink.

With Fee July 17, 1970. Ray E. Lee, Registrar-Recorder, Los Angeles County, California, July 16, 1970.

D

Term, 1970

No. 424

[illegible], *et al.*,

Petitioners (Applicants in Intervention),

vs.

PASADENA CITY BOARD OF EDUCATION, UNITED STATES OF AMERICA, NANCY ANNE SPANGLER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Brief in Opposition by Respondents Pasadena City Board of Education, Ralph W. Hornbeck, as Superintendent of Schools, Albert C. Lowe, LaVerne Lafayette, Joseph J. Engelen, Bradford C. Hosmer and Henry C. Clark, as Members of the Pasadena City Board of Education.

JOHN P. POLLOCK,
612 South Flower Street,
Suite 812,
Los Angeles, Calif. 90017,
Counsel for Respondents Pasadena City Board of Education, et al.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 625-0750

SUBJECT INDEX

	Page
Reasons for Denying the Writ	2
1. There Is No Conflict Among the Circuits	2
2. The Decision by the Ninth Circuit Does Not Conflict With Any Decision of This Court	6
Conclusion	8

TABLE OF AUTHORITIES CITED

Cases	Page
Blocker v. Board of Education of Manhasset, New York, 229 F. Supp. 714 (1964)	3
Cascade Natural Gas Corp. v. El Paso Natural Gas Corp., 386 U.S. 129 (1967)	6, 7, 8
Hobson v. Hansen, 44 F.R.D. 18 (1968)	6
Honda v. Clark, 303 F. Supp. 213 (1968)	6
Lupton Mfg. Co. v. United States, 388 U.S. 457 (1967)	8
Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961)	3
Smuck v. Hobson, 408 F. 2d 175 (1969)	2, 6
Rules	
Federal Rules of Civil Procedure, Rule 24	7
Federal Rules of Civil Procedure, Rule 24(a)	2, 6
Federal Rules of Civil Procedure, Rule 24(b)	2
Statute	
Clayton Act, Sec. 7	8
Textbooks	
81 Harvard Law Review, pp. 356, 400-407	6
81 Harvard Law Review, pp. 721, 757-759	6

IN THE

Supreme Court of the United States

October Term, 1970
No. 424

STANLEY ALEXANDER, *et al.*,
Petitioners (Applicants in Intervention),

vs.

PASADENA CITY BOARD OF EDUCATION, UNITED STATES OF AMERICA, NANCY ANNE SPANGLER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief in Opposition by Respondents Pasadena City Board of Education, Ralph W. Hornbeck, as Superintendent of Schools, Albert C. Lowe, LuVern LaMotte, Joseph J. Engholm, Bradford C. Houser and Henry G. Clark, as Members of the Pasadena City Board of Education.

This Brief in Opposition is by some, but not all, respondents. These respondents were the defendants in the trial court, the ones against whom the judgment was entered and the ones responsible for the operation of the grammar schools, intermediate schools and high schools of Pasadena, California. We understand that other respondents also will file Briefs in Opposition. We adopt and incorporate their argument and their statements to the extent that they are not inconsistent with this Brief.

REASONS FOR DENYING THE WRIT.

1. There Is No Conflict Among the Circuits.

Petitioners claim that the decision below is in conflict with *Smuck v. Hobson,* D.C. Cir., 408 F. 2d 175 (1969). Such is not the case. In *Smuck,* the District Court exercised its discretion by granting intervention to the parent group. In the instant case, the District Court, interpreting Rule 24(a) F.R.C.P. and exercising its discretion, denied intervention. In *Smuck,* therefore, the issue was whether the trial court abused its discretion in granting intervention; while here, the issues before the Court of Appeals were (1) whether petitioners could intervene as a matter of right under Rule 24(a) F.R.C.P. and (2) whether the District Court had abused its discretion under Rule 24(b) by denying intervention.

The factual circumstances in *Smuck* were unique. In *Smuck,* the parent group was permitted to intervene by the trial court for a limited purpose and under factual circumstances of a change in the composition of the school board itself. These changed circumstances, involving the replacement of an appointed school board by an elected school board, were such that the new school board in *Smuck* wanted to appeal but had come into existence too late to perfect an appeal. Such is not the case here. Here the elected School Board that energetically defended the case in the trial court, that after judgment and upon open hearing decided not to appeal, is the same elected School Board that now resists granting certiorari.

On the surface, it may seem paradoxical that these respondents, who so vigorously opposed the entry of any judgment against them, should now, with equal

vigor, oppose petitioners who seek to have that judgment reversed. There really is no inconsistency. While these respondents urged in the trial court that there was no basis for the plaintiffs' or the Government's charges of discrimination, while these respondents urged in the trial court that there was no practical need for a judgment ordering the submission of a plan for integration, these respondents, nevertheless, after judgment, determined to submit their Plan for Integration in accordance with the terms of that judgment rather than leave the issues in limbo for yet another year.

The judgment was entered in January, 1970. Respondents' Plan for Integration was approved by the trial court on March 4, 1970.[1] That judgment and that plan called for implementation by the commencement of the school year in September, 1970, and there has been no deviation by these respondents from their announced goal of implementing the Plan for Integration in September, 1970. Action continues unabated to reassign school children in order to insure that no school within the District contains a majority of any minority racial group.

Petitioners have never claimed, either in the courts below or in their present petition, that respondents' decision not to appeal was made in bad faith or by malfeasance.

(See: *Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 698 (1961);

Blocker v. Board of Education of Manhasset, New York, E.D.N.Y., 229 F. Supp. 714 (1964).)

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[1]The District Court offered these petitioners an opportunity to participate in the hearing upon the Plan for Integration. The offer was rejected. [Clk. Tr. p. 226.]

Furthermore, petitioners do not now and never have questioned the fact that permitting them intervention would create turmoil and confusion within the Pasadena community and upset the smooth administration of the District's schools. The trial judge, in denying intervention so found, so saying:

> ". . . The defendant Pasadena City Board of Education, standing here in opposition to this motion, would be severely prejudiced by the granting of the motion." [Clk. Tr. pp. 227-228.]

The Court of Appeals was similarly impressed. It stated:

> ". . . Before us the board opposes appellants in their effort to intervene. It wishes to be free forthwith to put its plan into operation and argues persuasively that intervention and a prolongation of this suit will cause confusion and turmoil within the school district and be disruptive of their plan." (Appendix A to Petition, p. 5.)

Surely, the granting of certiorari by this Court after the 1970 school year commences would intensify the confusion, turmoil and uncertainty with which the District Court and the Court of Appeals were concerned. The passage of time and the leadership by the Board of Education have produced a smoothing of the way toward reduction of the racial imbalance of students. That will all be lost by the granting of the Writ. The uncertainty will cause the stirring of passions within the community and encouragement to those who dissent.[2]

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[2]The public statement by President Nixon on March 24, 1970 is particularly appropriate. He said: "Where desegregation proceeds under the mandate of law the best results require that the plans be carefully adapted to local circumstances . . . In

Petitioners have attempted to bring themselves closer to *Smuck* by reference to a recall election which is now planned to take place in the Fall of 1970. Three members of the Board of Education (respondents) will be subject to a determination by the voters as to whether they shall continue in office. This special election, regardless of its outcome, does not alter the present status and character of the Board of Education nor does it affect in any way the judgment of the District Court and the approved Plan for Integration. Indeed, the right to recall members of the Board of Education dramatizes the difference between this case and *Smuck*. Here, the members of the Board of Education always have been responsive to the will of the electorate. The electorate, consequently, has the final voice in the policy and program of the District. In *Smuck*, that was not so when the decision was made by that appointed board not to appeal.

The Court of Appeals recognized that the Board of Education always has the right to seek a modification or change in its Plan for Integration if it feels that circumstances warrant a change. (Appendix A to Petition, p. 5.) The District Court's judgment provided for continuing jurisdiction and, therefore, leaves open to the present Board or any future Board the right to return to the District Court to seek approval of modifications to the Plan for Integration. [Clk. Tr. p. 60.]

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those communities facing desegregation orders, the leaders of the communities will be encouraged to lead—not in defiance, but in smoothing the way of compliance."

2. The Decision by the Ninth Circuit Does Not Conflict With Any Decision of This Court.

Petitioners grasp for *Cascade Natural Gas Corp. v. El Paso Natural Gas Corp.*, 386 U.S. 129 (1967), and the broad language contained in its majority opinion.[3]

In *Cascade,* this Court was confronted with an order of divestiture which had been frustrated by the Department of Justice and the defendants. This Court held that the State of California and Southern California Edison Company should be permitted to intervene under Rule 24(a) because they had an economic interest in the competitive system which would be "adversely affected" by the settlement. This court was concerned whether the provisions of its order of divestiture had been followed in good faith. Viewed in the setting of those unusual circumstances, and expanded interpretation of Rule 24(a) was proper to permit those who would be directly and economically affected by the settlement to be heard.

Cascade did not purport to expand the phrase "adversely affected" to include every consumer, every stockholder, every creditor, or every citizen who might be remotely affected by a determination made involving

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[3]Lower courts have recognized that *Cascade* should not be read as a carte blanche for intervention by anyone at anytime.

Smuck v. Hobson (D.C. Cir.) 408 F. 2d 175 (1969);
Hobson v. Hansen (D.C.D.C. 1968) 44 F.R.D. 18;
Honda v. Clark (D.C.D.C. 1968) 303 F. Supp. 213;

See also:

Shapiro, Some Thoughts On Intervention Before Courts, Agencies and Arbitrators; 81 Harv. L. Rev. 721, 757-759; Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure; (I) 81 Harv. L. Rev. 356, 400-407.

his supplier, his corporation, his debtor or his community or school district. Rather, *Cascade* recognized that the 1966 amendment to Rule 24 amplified pre-existing federal practice regarding intervention, but this Court, at the same time, recognized that there was a limit to the elasticity and that it is not always easy to "draw the line". (386 U.S. 129, at 134.)

This Court, in *Cascade,* was concerned with the enforcement of the Clayton Act while at the same time providing a safeguard to the private interests by giving them a voice in the enforcement process. Here, such is not the case. Here, the Pasadena School Board is not precluded from carrying out its Plan for Integration. The effect of the judgment is not to limit the School Board in what it now plans to do. The School Board, having decided to comply with the judgment and having adopted its Plan for Integration is not acting contrary to any statutory or constitutional interests of any group. What the petitioners seek to accomplish by intervention, therefore, is not to prevent the School Board from doing something unconstitutional; rather, it is to obtain a judicial determination that the School Board is not required to do for constitutional reasons that which it wants to do. Stated more bluntly, the School Board, with or without the judgment, has embarked upon a program for the integration of its schools commencing September, 1970. While that program may provide for more racial balance of students than some constitutional authorities say that it needs to provide, and while that program may provide for more racial balance of the School District than the District Court ordered, the objection by petitioners is not a constitutional objection; the interest which petitioners may

have would be unaffected by a modification of the District Court judgment or even a complete reversal of it.

Cascade is not controlling here and the opinion by the Ninth Circuit is not in conflict with *Cascade* because, unlike *Cascade,* the School Board here has the right to do what it now proposes to do, namely, integrate the Pasadena Schools. In *Cascade,* the intervenors had an interest because the Government and the other parties of the litigation had no right to make a settlement that ran afoul of Section 7 of the Clayton Act.

This Court, in a *per curiam* decision in *Lupton Mfg. Co. v. United States,* 388 U.S. 457 (1967) dismissed an appeal from a denial of intervention in a case involving an antitrust consent decree. The Ninth Circuit correctly interpreted the *Lupton* decision as demonstrating the very limited application of *Cascade.*

Conclusion.

Throughout the trial in the District Court, these respondents took the emphatic position that they had been, were then, and would continue to take effective and prompt steps to provide for complete integration of the Pasadena Schools to overcome the racial imbalance which had resulted from assigning children primarily to schools in the neighborhoods in which they live. The determination not to appeal from the District Court judgment was a determination consistent with respondents' previously announced attitude and objectives. Submission of the Plan for Integration within thirty days after the entry of judgment demonstrated respondents' desire to promptly proceed toward full integration. To now permit petitioners to intervene will

not postpone the step being taken toward establishing better racial balance. The most petitioners can gain from a granting of the Writ is confusion and disillusionment of many within the Pasadena community.

Both the factual reasons and for the legal reasons the Petition should be denied.

August 19, 1970.

Respectfully submitted,

JOHN P. POLLOCK,

Counsel for Respondents Pasadena City Board of Education, et al.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 424

STANLEY ALEXANDER, ET AL., PETITIONERS

v.

PASADENA BOARD OF EDUCATION, ET AL.,

AND

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–7) is not yet reported. The order of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1970. The petition for writ of certiorari was filed on July 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

402-076—70

QUESTIONS PRESENTED

1. Whether petitioners had a right to intervene under Rule 24a of the Federal Rules of Civil Procedure for the purpose of appealing the district court's school desegregation order, when the Board of Education, the principal defendant, acquiesced in the order.

2. Whether the district court's refusal to grant petitioners leave to intervene under Rule 24b—the permissive intervention provision—was an abuse of discretion.

STATEMENT

This school desegregation suit was commenced by private plaintiffs in August 1968. The United States intervened pursuant to Section 902 of the Civil Rights Act of 1964, 42 U.S.C. 2000h–2, in December 1968. After a lengthy hearing on the merits, the district court, on January 23, 1970, ordered the school board to submit a desegregation plan.[1]

After the school board submitted its desegregation proposal, petitioners, parents of school-age children attending schools operated by the Pasadena City Board of Education, moved for leave to intervene pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. The district court, which treated the motion under Rule 24 (a) and (b), denied intervention on the grounds that movants had been ade-

[1] In extensive findings of facts and conclusions of law, the district court held that the school board had committed racially discriminatory acts in the areas of student assignment, faculty and staff hiring and promotion, construction, intra-district transfers, and ability grouping. *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal.).

quately represented at all stages of the proceedings by the school board and the individual defendants; that the motion, filed subsequent to entry of judgment, was untimely; and that the Pasadena City Board of Education, which opposed the motion, would be prejudiced if it were granted.[2] The district court then approved the Board's school desegregation plan. The court's order denying intervention was appealed on an expedited schedule,[3] and the court of appeals affirmed.

ARGUMENT

1. The courts below correctly held that petitioners had no right to intervene under rule 24(a). Although petitioners contend that this holding conflicts with the decision in *Smuck* v. *Hobson,* 408 F. 2d 175 (C.A.D.C.), the opinion below specifically follows the rationale of *Smuck* and reaches a result entirely consistent with that decision. Because the authority to make educational policy is vested in the school board, rather than the parents, both courts of appeals agreed that parents have the right to intervene in a suit like the present one only for the limited purpose of protecting "the freedom of their school board from excessive judicial interference" (Pet. App. 5) with the exercise of its discretion within constitutional bounds. See 408 F. 2d at 181–182. Under this rationale, the differences in the specificity of the desegregation orders and in other

[2] The United States stated (Rep. Pet. Tr. p. 25) that "we think it would be a proper exercise of this [district] court's discretion to permit these parents to intervene for the limited purposes of appeal" and that "we would not shrink from an appeal."

[3] At the same time, petitioners filed a protective notice of appeal from the decision approving the desegregation plan.

circumstances of the two cases called for the difference in result reached.

In *Smuck,* the trial court's decree included specific requirements "relating to optional zones, faculty integration and pupil bussing" (408 F.2d at 183), and the court of appeals held that the parents had a right to intervene in order to challenge these specific limitations on the school board's discretion. The court of appeals declined, however, to review other, more general aspects of the decree, at the behest of the parents, because they did not materially interfere with the school board's discretion (408 F.2d at 186–190). In the present case, the broad decree of the district court avoided prescription of specific measures, comparable to those reviewed (and upheld on the merits) in *Smuck.* In essence, the district court here merely ordered the board to submit a desegregation plan, and did not interfere with the board's discretion in choosing the means for achieving the constitutionally required result.[4] The interest in main-

[4] While there was a comprehensive desegregation plan before the court, which had been devised by the government's expert witness, its adoption and implementation were not required. Moreover, the district court's order included no specific student assignment, grade restructuring, construction, or transportation requirements. The school board was constrained only in the sense that it was ordered to develop a student assignment plan which would leave no schools with a majority of minority-race students (311 F. Supp. at 505). In providing remedies, district courts have broad discretion to fashion such general guidelines (see, *e.g.*, *United States* v. *Montgomery County Board of Education*, 395 U.S. 225) and, in doing so here, the district court did not materially interfere with the board's discretion to make educational policy.

taining the school board's discretion was, therefore, adequately protected by the board itself—there was, in other words, "adequate representation" of petitioners' interests for purposes of Rule 24(a). Cf. *City of New York* v. *United States,* 397 U.S. 248.

Moreover, the decision upholding a right of intervention in *Smuck* was based in part on the fact that a newly elected school board had replaced the appointed board. The latter made the decision not to appeal, but the former felt its effects. 408 F. 2d at 177. In the present case, the same elected board which decided to acquiesce in the district court's decision will presumably implement it.[5] Cf. *Alleghany Corp.* v. *Kirby,* 344 F. 2d 571 (C.A. 2), certiorari granted, 381 U.S. 933, certiorari dismissed, 384 U.S. 28; *Blocker* v. *Board of Education of Manhasset,* 229 F. Supp. 714, 715 (E.D. N.Y.).

2. The district court did not abuse its discretion under Rule 24(b) by denying leave for permissive intervention, once it concluded there was no right to intervene under Rule 24(a). The motion was filed after entry of judgment at a time when the Board was anxious to begin implementing its desegregation plan for the 1970–71 school year. The delay which would result from intervention constituted sufficient prejudice to existing parties to justify this exercise of the court's discretion.

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[5] The speculative prospect of a change in the membership of the board, whether by recall or the ordinary elective process, does not put this case "on all fours" with *Smuck* (Pet. 13–14). That case presented the unique situation of a fundamental change from an appointive to an elective board.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
Assistant Attorney General.
JOSEPH B. SCOTT,
Attorney.

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